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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

MANUEL OCEGUERA,

Defendant and Appellant.

E039375

(Super. Ct. No. FSB048142)

OPINION

APPEAL from the Superior Court of San Bernardino County. Douglas A. Fettel,
Judge. Affirmed with directions.

Neil Auwarter, under appointment by the Court of Appeal, for Defendant and
Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney
General, Gary W. Schons, Senior Assistant Attorney General, and Scott C. Taylor,
Supervising Deputy Attorney General, for Plaintiff and Respondent.

Appellant Manuel Ocegüera challenges as unconstitutionally vague and overbroad the probation conditions that forbid him to wear gang attire, display gang hand signs, and associate with gang members. Respondent People argue that appellant waived these arguments by not specifically raising them in the trial court. However, the People also state that, if this court finds the arguments were not waived, they are not opposed to modifying the conditions for clarity.

For the reasons particular to this case as discussed below, we affirm the conviction with directions to modify the probation conditions as specified.

FACTS AND PROCEDURE

Appellant pleaded guilty to possession of methamphetamine for sale. (Health & Saf. Code, § 11378.) After failing to appear for sentencing on a *Cruz*¹ waiver, appellant was eventually sentenced to probation and 210 days in jail.

At the November 14, 2005, sentencing hearing, defense counsel asked “to be heard as to a couple [of probation] conditions.” The verbatim transcription of these objections follows:

“THE COURT: Sure.

“[DEFENSE COUNSEL]: I have previously gone over each and every one of those conditions with him.

“THE COURT: What terms?

“[DEFENSE COUNSEL]: As to strike the term pets in number 7.

¹ *People v. Cruz* (1988) 44 Cal.3d 1247.

“THE COURT: Number seven denied.

“[DEFENSE COUNSEL]: As to 24, 25, and 26, although there is an admission of some gang involvement at some time, I think they’re unconstitutional and overbroad.

“THE COURT: Okay. Anything else?

“[DEFENSE COUNSEL]: No, thank you.”

The trial court then imposed the probation conditions as proposed. This appeal followed.

DISCUSSION

1. *Waiver.*

The People do not oppose modifying the probation conditions at issue in this appeal as appellant suggests. However, the People also assert that appellant waived these arguments by failing to make specific objections at the sentencing hearing.

A criminal defendant waives an objection to a probation condition by failing to raise the objection and make an offer of proof at the sentencing hearing. (*People v. Welch* (1993) 5 Cal.4th 228, 235 (*Welch*)). This waiver rule helps “discourage the imposition of invalid probation conditions and reduce the number of costly appeals brought on that basis.” (*Ibid.*) Here, defense counsel made only a general objection that probation condition No. 24 is “unconstitutional and overbroad,” and did not object to condition Nos. 17 or 22 at all.

An exception to the above general waiver rule is that a probation condition may be challenged on appeal without prior objection if it presents a pure question of law arising from facts, which are undisputed. (*Welch, supra*, 5 Cal.4th at p. 235.) However, the

courts are currently split as to whether the issue of unconstitutional vagueness and overbreadth are such “pure questions of law.” Some courts of appeal have held that constitutional issues of vagueness or overbreadth are subject to waiver because they are not pure questions of law. (*People v. Gardineer* (2000) 79 Cal.App.4th 148, 151-152 [observe good conduct]; *In re Josue S.* (1999) 72 Cal.App.4th 168 [maintain satisfactory grades].) However, one court has held that a constitutional challenge to the vagueness or overbreadth of a probation condition is not waived because the objection presents a pure question of law that can be resolved without reference to the sentencing record. (*In re Justin S.* (2001) 93 Cal.App.4th 811, 814-815.)

In this particular case, we choose to review the merits of appellant’s claims because: (1) the courts of appeal are split as to the waiver issue and the issue is presently before the Supreme Court in *In re Sheena K.* (2004) 116 Cal.App.4th 436, review granted June 9, 2004, S123980;² (2) the People do not oppose amending the probation conditions at issue; and (3) we find it in the interest of judicial efficiency to forestall any future ineffective assistance of counsel claim.

2. *Omission of “Knowing” Requirement From Probation Condition Regarding Gang Attire.*

Probation condition No. 24 provides that appellant:

² The court directed the parties to brief the following issues in this case: (1) Is a challenge to a condition of juvenile probation as unconstitutionally vague or overbroad waived or forfeited by the failure to object to the condition at the time of the dispositional hearing in juvenile court? (2) Is a probation condition that a minor “not associate with anyone disapproved of by [her] probation [officer]” unconstitutionally vague or overbroad?

“Not wear, display or have in your possession any item associated with gang dress or any item prohibited by the probation officer including but not limited to any insignia, emblem, button, badge, cap[,] hat, scarf, bandanna or any article of clothing, hand sign or paraphernalia associated with membership of affiliation in any gang.”

Appellant argues that probation condition No. 24 is unconstitutionally vague and overbroad because its application is not limited to items known by appellant to be gang related. In other words, appellant could be found to have violated this condition of his probation by wearing an item of clothing considered to be gang related even if he did not know it was gang related.

In *People v. Lopez* (1998) 66 Cal.App.4th 615, at page 622, the court found a probation condition, similar to probation condition No. 24, unconstitutionally overbroad. The court reasoned that the condition was overbroad because it did not require the defendant to know that the item has gang significance. (*Id.* at pp. 628, 634.) The People state that, while they could argue that the knowing requirement was implicit in the condition, they do not oppose the modification of the condition “to increase its clarity.” Therefore, probation condition No. 24 should be altered to require that appellant not “knowingly” wear gang attire, etc.

3. *Definition of “Gang” as a “Criminal Gang.”*

Appellant also argues that where probation condition Nos. 17 (no association with gang members), 22 (no display of gang hand signs), and 24 (no display or possession of gang attire) refer to “gangs,” the reference should be changed to “criminal gang as defined in Penal Code section 186.22, subdivisions (e) and (f).” This is because the term

“gang” is unconstitutionally vague and overbroad because it could include any close-knit group of people. Both appellant and the People cite *People v. Lopez, supra*, 66 Cal.App.4th at pages 632-634, which, while not actually holding that the term “gang” is unconstitutionally vague and overbroad, ordered a change similar to that requested here so that “any due process concerns about it will be eliminated and [the defendant] will be unambiguously notified of the standard of conduct required of him.” We agree that the requested change should be made.

DISPOSITION

The conviction is affirmed. The trial court is directed to hold a new sentencing hearing, at which appellant shall be given the opportunity to accept or object to the following amendments of probation condition Nos. 17, 22, and 24:

Probation conditions Nos. 17, 22, and 24:

“For the purposes of probation condition Nos. 17, 22, and 24, the word ‘gang’ means a ‘criminal street gang’ as defined by Penal Code section 186.22, subdivisions (e) and (f).”

Probation condition No. 24:

“Defendant shall not wear, display or have in his possession any item *defendant knows or has reason to know* is associated with gang dress or any item prohibited by the probation officer including, but not limited to any insignia, emblem, button, badge, cap

hat, scarf, bandanna, or any article of clothing, hand sign, or paraphernalia, which *the defendant knows or has reason to know*, is associated with membership or affiliation in any gang.”

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McKINSTER
J.

We concur:

RAMIREZ
P. J.

MILLER
J.